

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

THIS DOCUMENT RELATES TO
J&J CLASS 1

Master Civil No. 01-cv-12257

MDL No. 1456

Judge Patti B. Saris

LEAVE TO FILE GRANTED 6/14/10

**CLASS COUNSEL'S REPLY BRIEF IN SUPPORT OF THEIR
MOTION FOR SANCTIONS AGAINST DON HAVILAND**

In their Opening Motion, Class Counsel made clear that, though the Withdrawing Plaintiffs represented to the Court that they would pursue the case against J&J to its end, in order to avoid having to appear before the Court in which he has been removed as Class Counsel, and to punish Class Counsel whom he believes to be responsible for his removal, Mr. Haviland withdrew these plaintiffs' claims three days before oral argument on J&J's post-remand motions for summary judgment. In response [Dkt. No. 7100], Mr. Haviland claims that his clients *never intended* to pursue this case to its end (*id.* ¶ 2), and that the Withdrawing Plaintiffs have intended to withdraw ever since Class Counsel did not file a separate Notice of Appeal of this Court's dismissal of Class 1's claims against J&J. *Id.*¹ (Mr. Haviland also claims that the Withdrawing Plaintiffs are angry because, with regard to the Track 2 settlement, Class Counsel allegedly "replaced" them another class representative. *Id.*) These petty retorts are further support for Class Counsel's Motion.

¹ Mr. Haviland states that Class Counsel "refused" to take this appeal, but does not and never has offered any evidence that Class Counsel so refused. Indeed, such a position would be absurd given that Class Counsel assumed the prosecution of the appeal after Mr. Haviland was disqualified and succeeded in having this Court's entry of judgment overturned.

If this Court is to take Mr. Haviland at his word, the Withdrawing Plaintiffs have wanted to withdraw since Class Counsel replaced Mr. Haviland in the appeal of this Court's entry of judgment against Class 1 and in favor of J&J. *See* Dkt. No. 7100 ¶ 2. The fact that Mr. Haviland, knowing this to be true, encouraged or otherwise advised his clients to remain in the case against their wishes only to withdraw at a time that would hurt the Class and Class Counsel most – in order to serve his own interests – is exactly why Class Counsel filed their Motion in the first instance.

Thus, for all of the reasons set forth in Class Counsel's Motion, to which Mr. Haviland has in large part failed to provide *any* response,² this Court should, pursuant to 28 U.S.C. § 1927, require Mr. Haviland to pay the attorneys' fees incurred by Class Counsel in connection with pursuing the Class 1 appeal against J&J, and in briefing the post-remand motions for summary judgment. Awarding those fees is appropriate because neither of those tasks would have been required if the Withdrawing Plaintiffs had withdrawn their individual claims in February 2008, when Class Counsel were replaced as counsel for the First Circuit J&J appeal and Mr. Haviland has represented the Withdrawing Plaintiffs initially wanted to withdraw.

DATED: May 12, 2010

Respectfully submitted,

By: /s/ Steve W. Berman

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² Mr. Haviland claims that he bases his Opposition on "evidence that will be elicited" at the June 21, 2007 hearing on Class Counsel's Motion. That hearing is not an evidentiary hearing and any "evidence" introduced at that hearing without notice to Class Counsel or J&J should not be considered.

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CERTIFICATE OF SERVICE

I hereby certify that I, Steve W. Berman, an attorney, caused a true and correct copy of the foregoing, *Class Counsel's Reply Brief in Support of Their Motion for Sanctions Against Don Haviland* to be delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on May 12, 2010, a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Steve W. Berman
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